

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ETHEL RICHARDS	:	DETERMINATION
for Revision of a Determination or for Refund	:	ON REMAND
of Sales and Use Taxes under Articles 28 and 29	:	DTA NO. 805365
of the Tax Law for the Period September 1, 1978	:	
through August 31, 1984.	:	

Petitioner, Ethel Richards, 29-15 Butler Street, East Elmhurst, New York 11369, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1978 through August 31, 1984.

A determination of this matter was issued on January 10, 1991 by Nigel G. Wright, Administrative Law Judge. The Division of Taxation filed an exception with the Tax Appeals Tribunal.

On December 3, 1991, the Tax Appeals Tribunal in a decision remanded this case to the Administrative Law Judge to enable the petitioner to enter a specified "large volume" into evidence, to issue a determination dealing with the taxable status of the purchases at issue, and to explain certain events subsequent to the July 13, 1989 hearing of this case.

Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether certain expenditures by Berg Chemical Co. (of which petitioner was an officer) during the two quarters ending February 28, 1981 and May 31, 1981 (and for which taxes of \$174.88 and \$128.32, plus penalty and interest, respectively, would be due) were subject to the sales and use tax.

II. Whether the acquisition of certain fixed assets by Berg Chemical Co. (of which petitioner was an officer) during the period March 1, 1982 through August 31, 1984 (and for which a tax

of \$663.29, plus penalty and interest, would be due) was subject to the sales and use tax.

ADDITIONAL FINDINGS OF FACT

The Division of Taxation has consented (by letter dated January 31, 1992) to the cancellation of tax assessed by notice number S850330461C for the two quarters ending February 28, 1981 and May 31, 1981 in the amounts of \$174.88 and \$128.32, respectively.

The Division of Taxation has consented (by letter dated January 31, 1992) to the cancellation of tax assessed by notice number S850330462C in the amount of \$663.29 as it relates to the fixed assets.

The events following the July 13, 1989 hearing can be explained to the following extent: A hearing scheduled for October 16, 1989 was adjourned by the parties for settlement discussions. A new hearing was scheduled for September 21, 1990 before a different administrative law judge. This second hearing was cancelled but petitioner was apparently not notified of the cancellation. It is not clear from the record why it was cancelled or why petitioner was not so advised. On September 21, petitioner but not the Division appeared before Administrative Law Judge Thomas Sacca who heard her arguments and apparently decided that a new hearing was not necessary. I assumed from a conversation a few days later with Judge Sacca that both parties had agreed not to have a further hearing. I was not aware that a record was made of the September 21 appearance when I prepared my determination and did not see the transcript until after the decision of the Tax Appeals Tribunal.

The petitioner has entered into evidence the specified "large volume". The attorney for the Division of Taxation has examined that volume.

CONCLUSIONS OF LAW

A. To recapitulate the prior determination and decision in this case: this case involved three determinations of tax due.

(1) A notice of determination number S850330460C dated April 5, 1985 for the quarter ending November 30, 1980. This was found to be invalid in the Administrative Law Judge determination (Conclusion of Law "A") and conceded by the Division of Taxation to be

untimely and so found to be untimely in the Tribunal decision. This is not in dispute.

(2) A notice of determination number S850330461C dated April 5, 1985 for the period September 1, 1978 through February 28, 1982. This was found to have been untimely for all quarters in the Administrative Law Judge determination (Conclusion of Law "B"). It was also found to be untimely for all but two quarters (the two quarters ending February 28, 1981 and May 31, 1981) by the Tribunal. With respect to the two specified quarters, the purchases are still in issue. The tax for the two quarters was \$174.88 and \$128.32, respectively, plus penalty and interest (see modified finding "6[b]" in the Tribunal's decision).

(3) A notice of determination number S850330462C dated April 5, 1985 for the period March 1, 1982 through August 31, 1984. This was in the amount of \$1,351.55, plus penalty and interest. Of this, \$688.26 was attributable to tax due on recurring expenses and \$663.29 was due to tax due on the purchase of fixed assets. Petitioner conceded at the hearing her

liability for tax on recurring expenses. The tax attributable to fixed assets was found not due in the determination (Conclusion of Law "D"). The Tribunal reversed that conclusion and remanded for further findings with respect to the tax of \$663.29 on fixed assets.

B. The concessions by the Division of Taxation resolve all issues arising under the notices of determination.

C. The petition of Ethel Richards is granted to the extent that the the Division of Taxation is directed to: cancel the notice of determination number S850330460C for the quarter ending November 30, 1980; cancel the notice of determination number S850330461C for the period September 1, 1978 through February 28, 1982; partially cancel the notice of determination number S850330462C for the period March 1, 1982 through August 31, 1984 in the amount of \$663.29, plus penalty and interest; but to sustain said notice number S850330462C in the amount of \$688.26, plus penalty and interest.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE